

1                   BEFORE THE POLLUTION CONTROL HEARINGS BOARD  
2                   STATE OF WASHINGTON

3           GARY & DIANA FIELDS,                   }  
4                                   Appellants,                   }           PCHB No. 90-15  
5                                   v.                               }  
6           STATE OF WASHINGTON,                   }           FINAL FINDINGS OF FACT,  
7           DEPARTMENT OF ECOLOGY,                   }           CONCLUSIONS OF LAW  
8                                   Respondent.                   }           AND ORDER  
9           \_\_\_\_\_}

10           This matter, the appeal of the denial of an application to  
11           appropriate surface waters of a tributary to the Little Klickitat  
12           River came on for hearing before the Board, Wick Dufford, presiding,  
13           on April 6, 1990, in Yakima, Washington. Judith A. Bendor, chair, has  
14           reviewed the record.

15           Edward Shamek, Attorney at Law, represented the appellants. P.  
16           Thomas McDonald, Assistant Attorney General, represented the  
17           Department of Ecology. The proceedings were reported by Randi R.  
18           Hamilton by Gene Barker and Associates.

1           Witnesses were sworn and testified. Exhibits were admitted and  
2 examined. From the testimony heard and exhibits examined, the Board  
3 makes the following

4                               FINDINGS OF FACT

5                                       I

6           The Little Klickitat River rises in the Simcoe Mountains near  
7 Satus Pass and flows southwesterly for about 33 miles before joining  
8 the Klickitat River. The drainage of the Little Klickitat comprises  
9 approximately 280 square miles, characterized by rugged, forested  
10 mountains in the north which give way to rolling grasslands in the  
11 plateau area of the south.

12           Much of the plateau area is developed for agricultural and  
13 residential use. The river is joined along its route by a number of  
14 perennial and intermittent tributaries. The river flows through the  
15 City of Goldendale a little beyond its halfway point.

16           The climate of the area is warm and dry in summer. Annual  
17 precipitation varies from 35 inches in the northern high elevations to  
18 less than 15 inches in the southern part.

19                                       II

20           Gary and Diana Fields are contract purchasers of about 30 acres  
21 of property near Bowman Creek, a tributary of the Little Klickitat,  
22 within Section 26, Township 5 North, Range 14 East, Willamette  
23 Meridian.

24           They purchased the property in December of 1980, two months after  
25

1 the commencement of a general adjudication of the waters of the Little  
2 Klickitat drainage, including Bowman Creek. (Klickitat County No.  
3 12978). For some reason the title report prepared in connection with  
4 the transaction did not reflect the lis pendens filed in the  
5 adjudication. The Fields had no actual notice of the pendency of the  
6 adjudication. An older house and a developed domestic water source  
7 were present on the property when they bought.

### 8 III

9 On February 11, 1982, the Fields applied for a permit to  
10 appropriate water from the existing source of domestic water on their  
11 property. The application sought .02 cfs for a continuous domestic  
12 supply. After a conversation with Diana Fields on February 16, Ecology  
13 staff filled in portions of the application about which there had been  
14 questions. The source of the water was described by the agency as an  
15 "unnamed spring" tributary to Bowman Creek and the application was  
16 assigned to the surface water category, as application S4-27835.

### 17 IV

18 The Fields' application was placed in a "hold" status and not  
19 processed, pending the completion of the general adjudication of the  
20 the Little Klickitat. The final decree in this matter was not entered  
21 until February 17, 1987.

V

One of the matters dealt with in the adjudication was a claim of right to the domestic water source on Field's property which had been filed by a predecessor in interest. He failed to appear in the proceeding and therefore, by reason of default, no right to take water from the source was confirmed.

VI

The general adjudication was held in response to problems created by chronic water shortages in the drainage. Two prior adjudications had already been completed on Little Klickitat tributaries, Blockhouse Creek and Mill Creek.

The three adjudications confirmed surface water diversion rights to aggregate instantaneous diversions of 60.874 cfs within the drainage. In addition, minimum flows were decreed to supply rights for non-diversionary stock watering.

At the present level of development, average flows near the mouth of the Little Klickitat range between 24 and 33 cfs between July 1 and October 1. During the dry months, then, very little water is left in the stream. In drought years, there may not be enough water available to satisfy the total of rights confirmed in the basin.

VII

The Little Klickitat lies within an area designated by a popular initiative in 1960 as an anadromous fish sanctuary. The sanctuary includes most of the tributaries to the Columbia River downstream of

1 McNary Dam and was created to "preserve and develop" food fish and  
2 game fish resources in these streams.

3 Among other restrictions, within the sanctuary area:

4 Except by concurrent order of the director of fisheries  
5 and director of game, it is unlawful to divert water  
6 from rivers and streams which will reduce the  
7 respective stream flow below the annual average low  
flow, based upon data published in United States  
geological survey reports. RCW 75.20.110.

#### 8 VIII

9 No instream flow for the protection of fish resources or other  
10 non-consumptive uses has been established by regulation for the Little  
11 Klickitat basin. However, Ecology's files reflect requests from the  
12 fish management agencies of the state since the late 1940s asking that  
13 no further diversions be allowed in the watershed.

14 Recently conducted flow studies demonstrate that, more likely  
15 than not, at the present level of usage, water in the Little Klickitat  
16 is below the average annual flow from mid-June until December.

17 Preliminary work on establishing in-stream flows to protect fish  
18 habitat and fish in the Little Klickitat basin indicates a need for  
19 substantially more water in the river than is now present in the  
20 summer and fall.

#### 21 IX

22 Depressed summer flows are presently exerting negative impacts on  
23 fish populations, through decreased habitat, increased predation,  
24

1 increased temperatures, reduced oxygen availability.

2 Both the Department of Wildlife (formerly Game) and Department of  
3 Fisheries have sent Ecology comment letters relating to pending  
4 applications for appropriation (including Fields') in the Little  
5 Klickitat basin. Both agencies have recommended that no additional  
6 diversions be approved.

7 X

8 The Northwest Power Planning Council is currently engaged in an  
9 effort to enhance salmon and steelhead production in the Little  
10 Klickitat drainage. Further reduction of instream flows would impede  
11 the achievement of this goal.

12 XI

13 On December 11, 1989, Ecology issued its Report of Examination on  
14 the Fields' application and an order of denial. On January 17, 1990,  
15 the Board received the Fields' appeal and assigned it docket number  
16 PCHB 90-15.

17 XII

18 After the Fields bought the property they made improvements to  
19 the house, fences, outbuildings and water source.

20 At hearing Mrs. Fields was unsure whether to call the source a  
21 well or a spring. Whatever it is, the Fields enclosed the area and  
22 put it under a roof. Ecology, in its field examination of the  
23 application apparently did not closely examine the source. The Report  
24

1 of Examination states:

2 The spring appeared to be within a concrete  
3 pumphouse to which no access was gained during the  
4 October 6, 1987 field examination.

5 XIII

6 The water system includes a reservoir, from which a surface  
7 overflow channel leads in the direction of Bowman Creek. The channel  
8 disappears into a marshy wetland. Any overflow water in it would  
9 eventually be tributary to the creek.

10 XIV

11 There are several drilled water wells in the Fields' neighborhood  
12 which provide domestic water to adjacent homes. Several of these  
13 wells are marginal in reliability and yield.

14 Drilling costs put the alternative of sinking a new well on the  
15 Fields' property beyond their financial reach. The pre-existing water  
16 system on their property is the sole source of water for the Fields  
17 and their child.

18 XV

19 The Fields' water system has been developed and in operation for  
20 some time. Neighborhood reputation would place its use back as far as  
21 1900. Thus, to the extent that such use may subtract from the waters  
22 of Bowman Creek, the subtraction is one of relatively long lineage.  
23 From this record it is not clear what work has been done in the ground  
24 for the development of the source.

XVI

The Fields' appropriation is small. There is no estimate as to what impact their use has on flows in Bowman Creek. However, it does have some effect, and, therefore, contributes to conditions which have seriously reduced fish populations in the drainage.

Any Conclusion of Law which is deemed a Finding of Fact is hereby adopted as such.

From these Findings of Fact, the Board reaches the following

CONCLUSIONS OF LAW

I

The Board has jurisdiction over the parties and the subject matter. Chapters 43.21B, 90.54, and 90.03 RCW.

II

Ecology's decision here is governed by the four substantive criteria of RCW 90.03.290: (1) beneficial use, (2) availability of public water, (3) non-impairment of existing rights, and (4) the public interest. Stempel v. Department of Water Resources, 82 Wn.2d 109, 508 P.2d 166 (1973).

III

The decision in the case at bar concerns a "where do you draw the line" question. Appellants' use is small enough that in isolation its effects will not be noticed.

The problem, however, is that the allowance of many such small

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1 diversions, each individually of little impact, can have a substantial  
2 impact on conditions for fish habitat.

3 On the other hand appellants' use is essential to their  
4 survival. Domestic water for household use is a basic necessity. For  
5 these appellants there appears to be no practical alternative source.  
6 Thus, in terms of public interest considerations, there are factors of  
7 considerable weight both for and against the appropriation.

#### 8 IV

9 The surface water code of this state contains no express  
10 preference for domestic use of water. The groundwater code, however,  
11 specifically excludes withdrawals for domestic use from the permit  
12 requirement. RCW 90.44.050. If the source is groundwater, up to the  
13 5000 gallons per day may simply be taken, without any need for  
14 government approval. It is, thus, critical here whether the Fields'  
15 source is legally characterized as surface water or groundwater. We  
16 conclude that Ecology's investigation was not adequate in this  
17 particular. They should re-investigate the site to determine if the  
18 source is groundwater rather than surface water.

#### 19 V

20 The appropriation is an old use which, through no fault of the  
21 appellants, has fallen through the cracks of the water right  
22 confirmation system. The agency should re-evaluate the matter of  
23 public interest in this case, in light of the testimony brought out at  
24

25  
26 FINAL FINDINGS OF FACT,  
27 CONCLUSIONS OF LAW AND ORDER

1 hearing, to determine whether issuance of a permit truly violates that  
2 criterion.

3 VI

4 Any Finding of Fact which is deemed a Conclusion of Law is hereby  
5 adopted as such.

6 From these Conclusions of Law the Board enters the following  
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ORDER

Application S4-27835 is remanded to the Department of Ecology for action consistent with Conclusion of Law IV and V above.

DONE this 22d day of June, 1990.

POLLUTION CONTROL HEARINGS BOARD

Wick Dufford  
WICK DUFFORD, Presiding

Judith A. Bendor  
JUDITH A. BENDOR, Chair

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